



Montana Fish, Wildlife & Parks

Senate Local Govt. Comm.

Exhibit No. 12

Date 3-18-2011

Bill No. 143 542

MEMORANDUM

TO: Senator Jon Sonju, Chairman
Senator Bruce Tutvedt
Senate Local Government Committee

FROM: Bob Lane, Chief Legal Counsel, Department of Fish, Wildlife & Parks *Bob Lane*
Becky Jakes Dockter, Agency Legal Counsel, Department of Fish, Wildlife
& Parks

DATE: March 18, 2011

RE: North Shore Flathead Subdivision Review Process and Facts

Questions Presented: This memorandum addresses three separate issues:

1. Whether the Department based its comments in the subdivision review upon scientific information and experience in the field.
2. Whether the Department was involved in a collusion to devalue the property with a subdivision denial (by the County) and then purchase of the property at the lower land values.
3. Whether the County settlement is proof of wrongdoing in denial of the subdivision.

Brief Answers:

1. Yes, the Department's comments submitted to the county were based upon textbook science involving documented waterfowl migration corridors and field monitoring experience over the course of decades of observations.
2. No, the Department did not collude with the County to deny the subdivision by submitting comments on the wildlife values and detriments of a large-scale development on the north shore Flathead Lake property in order to purchase the property at lower land values.
3. No, the County settlement did not indicate anything but that the subdivision was replanned and as amended, addressed all of the issues that warranted denial. Thus the County approved the amended subdivision and provided a lump sum to settle the matter out of court to allay any additions costs.

Rationale:

First, the Department submits comments that, though not peer reviewed because of the time it would take, are based upon textbook information and years of experience in the field dedicated to the resource on the very land upon which subdivision is proposed. The particular comments on the north shore property were based upon textbooks that showed waterfowl migration corridors across the very property at issue. The property abutted the Waterfowl Production Area owned by the U.S. Fish & Wildlife Service and had multiple hours of observation time documented for the waterfowl on the property. Additional comments were based upon the information provided by journals and manuscripts of biologists studying the effects of large-scale development on lakeshore habitat. Finally, the biologists who

teamed to provide comments held Masters Degrees and PhDs in their field of study and have worked for decades collectively on the very property that was proposed for large-scale subdivision. The biologists conferred with their supervisor who also holds a PhD in biology and vetted the comments. After the process of conferring, studying, discussions, and reference checks, the Department submitted its comment on the north shore Flathead Lake property.

The Department reviews sometimes hundreds of subdivision proposals per month. Because of the time it takes to go through the process to comment, there are only a few proposals that warrant the time and resources it takes to compile comments. Logically, the ones that warrant comments are the ones that will propose large-scale development that will adversely affect wildlife because of the sensitive location and the level of impact. While the Department recognizes that the comments could be more specific and tailored to the exact issue presented by each particular subdivision and that the comments sometimes appear too general and broad, the timing and lack of resources of the Department make it difficult to get specific studies on the issues and properties involved. In addition, the subdivision is, in essence, a plan for the future and not any one person, whether they have the credentials, experience, or the benefit of their peer's review, can know for certain, exactly what will happen on any one piece of property. The Department has a track record of working with and understanding wildlife resources and must rely upon that history to make comments about what they feel is the likely outcome.

In addition, the Department partners with community organizations to allay the impacts of large-scale development by offering to purchase lands that are sensitive to development impacts. Naturally, the areas that will have the most impacts are usually the ones that are most attractive to development such as riparian areas, lakeshores, and migration corridors. The Department offered to purchase the north shore property at the fair market value both before the subdivision was submitted and after. In every instance, the Department offered full fair market value of the property based upon a yellow-book federally approved and reviewed appraisal done by an appraiser with high qualifications and credentials.¹ The Department offered the appraisal's full fair market value of the north shore property at every juncture of negotiation². The developer's non-reviewed appraisal concluded the property had a substantially higher value to the property than the Department's appraisal.

At the same time that the Department was engaging in negotiation for purchase of the property, the developer submitted the subdivision review. Throughout the negotiations with the developer, the Department made it clear the impacts the subdivision could have value of the property, the impacts the subdivision could have on this important property for wildlife resources. Therefore, it should have come as no surprise that the Department saw fit to

¹ The standard for appraisals is to value the land at its "highest and best use" and not necessarily for the use of the lands at the time of the appraisal; unless, of course, the land was being put to the highest and best use. The Department appraiser took into consideration the development potential of the north shore Flathead Lake property in his appraisal. In addition, he had his appraisal reviewed by another qualified appraisal and approved as a fair and reasonable estimate of the fair market value of the land at issue.

² The Department has a policy to pay only fair market value for the properties for which it offers purchase. Without this limitation, the Department may have offered more than fair market value for the property in question because of the sensitive nature of the property and its importance to the community.

comment on the subdivision review. The comments were based upon scientific observations and literature and many years of experienced biologists who understood the importance of this particular property. The Flathead County Commission has the final say on the subdivision review, and this one was denied based upon three factors, only one of which was the wildlife issue. The other two factors for denial involved an easement for flood control in the area proposed for development and the lack of geotechnical assessments for the impacts of an earthquake on the safety of the homes. The denial came as a shock to the Department because of how rarely a denial occurs.

Finally, the County, was sued by the developer and eventually settled out of court. The County settled and paid a lump sum cash payment of \$1,000,000 and promised to construct roads through the subdivision if and when it is ever developed. In exchange, the developer amended the subdivision to address the three denial factors including increasing the buffer between the adjacent waterfowl production area, leaving 150 acres of open space land and allowing passive recreation to occur there, limiting the number of lots to a smaller number in a geographical area away from the lake, and requiring geotechnical assessments for the safety of the homes in the event of an earthquake. The value of the public recreation easement itself was determined to be \$600,000 secured by the County through the settlement. The Department was never sued for wrongdoing and thus, was never a part of the settlement or the settlement agreement. The County approved the amended subdivision and settled the matter because the subdivision addressed all points upon which they based their original denial and in addition, secured an access for the public that would not have been secured otherwise.

Summary:

The County Commissioners are the final decision-makers on a subdivision review. The Department submits comments, along with other agencies, local government entities, and the general public on subdivision review. The time and resource it takes to go through its internal process for comment dictates the limited number of substantive comments the Department submits and is indicative of the importance of the property and the level of impact expected. In addition, the Department often partners with community entities to purchase those properties that pose the largest subdivision risk. The north shore Flathead Lake is a sensitive and important property that has a high potential for development. The Department was prepared to pay the full fair market value based upon a reputable appraisal for that property and never, at any time, expected to get a lower land value for the property. The County settlement is not to be misconstrued as anything but a settlement of issues between the parties to a lawsuit that did not include the Department. There are many factors to consider in determining whether to settle a lawsuit and in the end, the County considers that it got a good settlement with an amended subdivision and a large open-space that is dedicated to public recreational use.

c: FWP Director